ORIGINAL

No. 90-5635

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

GEORGE BRONSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Supreme Court Rules 15.7 and 39, petitioner submits this supplemental brief calling the Court's attention to a recent decision issued since the filing of his pro se petition for a writ of certiorari. In Clark v. Poulton, et al., No. 88-1177 (10th Cir. Sept. 21, 1990), the United States Court of Appeals for the Tenth Circuit expressly rejected the holding and reasoning of the Second Circuit in McCarthy v. Bronson, 906 F.2d 835 (2d Cir. 1990), the decision below.[2] More generally, the Clark court noted an intercircuit conflict on whether, under the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B), a prisoner may be required to pursue a § 1983 "excessive-force" claim before a magistrate rather than directly in district court. Because at least six courts of appeals have now addressed this question and reached sharply divergent results, the Court should grant the petition to resolve this recurrent and important issue of federal law.

STATEMENT

This case involves a § 1983 action against a prison warden and several prison guards. Petitioner alleged that the defendants unlawfully sprayed him with tear gas, removed him from his cell, and otherwise used excessive force against him. The district court initially referred the case to a magistrate under 28 U.S.C. §§ 636(b)(1)(A) & (B), which authorize a judge, without the parties' consent, to designate a magistrate to handle certain pretrial matters. Thereafter, the parties consented, pursuant to 28 U.S.C. § 636(c), to have the entire case tried before the magistrate. At the start of the trial, however, petitioner sought leave to withdraw his consent, and the magistrate permitted him to do so. 906 F.2d at 838; see also 28 U.S.C. § 636(c)(6).

1 The Clark and McCarthy opinions are reproduced in an appendix to this brief.

Despite this development, the magistrate proceeded to conduct an eight-day bench trial, relying on the authority of 28 U.S.C. § 636(b)(1)(B). 906 F.2d at 839. Under § 636(b)(1)(B), a judge may designate a magistrate "to conduct hearings, including evidentiary hearings, and to submit to a judge . . . proposed findings of fact and recommendations for the disposition . . . of prisoner petitions challenging conditions of confinement." (Emphasis supplied.) At the close of trial, the magistrate issued his "Recommended Findings of Fact and Memorandum of Decision," see Pet. App. F, which found in favor of defendants on all of petitioner's claims and which the district judge subsequently endorsed. 906 F.2d at 838.

On appeal, the Second Circuit affirmed. In holding that the magistrate possessed the authority to try the case under 28 U.S.C. § 636(b)(1)(B), the court acknowledged that the case was "complicated by some uncertainties as to [this] authority," id. at 837, particularly with regard to "whether McCarthy's lawsuit is a petition 'challenging the conditions of confinement' within the meaning of subsection 636(b)(1)(B)." Id. at 839. Noting that the circuits were divided on the meaning of this subsection, the Second Circuit rejected the several opinions that had interpreted the phrase "conditions of confinement" to include "only challenges to pervasive prison conditions and [not] claims concerning specific episodes of misconduct by prison officials." Ibid. (rejecting Houghton v. Osborne, 834 F.2d 745 (9th Cir. 1987) and Hill v. Jenkins, 603 F.2d 1256, 1259 (7th Cir. 1979)

(Swygert, J., concurring)). Instead, the Second Circuit aligned itself with those decisions that "have construed the phrase ['conditions of confinement'] broadly to include almost any complaint made by a prisoner against prison officials." Ibid. (citing Branch v. Martin, 886 F.2d 1043, 1045 n.1 (8th Cir. 1989)). Under the latter interpretation, the Second Circuit concluded, McCarthy's allegation of a specific episode of unconstitutional conduct by prison officials qualified as a petition "challenging the conditions of confinement," thereby authorizing the magistrate to conduct McCarthy's trial despite his lack of consent.

ARGUMENT

I. The Tenth Circuit's Intervening Decision in Clark Exacerbates the Intercircuit Conflict Noted in the Petition.

The decision in Clark v. Poulton highlights the division among the courts of appeals on the precise question presented in this petition. In Clark, a divided panel of the Tenth Circuit specifically disagreed with the Second Circuit's interpretation of subsection 636(b)(1)(B). The Tenth Circuit relied on the "plain and commonly understood meaning of the word 'condition,'" a term that "clearly connotes an ongoing situation as opposed to an isolated incident." Slip op. at 9; see also id. ("'Condition' is defined as 'existing state of affairs,' and 'a mode or state of being.'") (quoting Webster's hird New International Dictionary 473 (1981)). In so ruling, the court specifically

adopted Judge Swygert's view that "conditions of confinement" encompasses "'ongoing prison practices and regulations with regard to matters such as placement in maximum security, deadlocks, unhealthy living conditions, unnecessary exposure to violence-prone inmates, overcrowded physical conditions, and cruel or unusual punishment by prison authorities." Id. at 7-8 (quoting Hill v. Jenkins, 603 F.2d at 1260). Since the prisoner's claims in Clark were based upon "two separate incidents of excessive force," id. at 2, the court concluded that they did not fall within § 636(b)(1)(B) and the magistrate therefore lacked jurisdiction to hear the claims without the prisoner's consent.[2]

With its decision in Clark, the Tenth Circuit has now joined the Fourth, Ninth and Eleventh Circuits in reading § 636(b)(1)(B) to authorize nonconsensual referral of a prisoner petition to a magistrate only where the petition challenges pervasive or ongoing prison practices or regulations. In contrast, the Second and Eighth Circuits have rejected that limitation, ruling that virtually any prisoner suit under 42 U.S.C. § 1983 qualifies as a "prisoner petition[] challenging the conditions of confinement." 28 U.S.C. § 636(b)(1)(B). As this

2 The court noted in addition "that one of Clark's excessive force claims arises from an alleged incident occurring before he was jailed and involving his probation officer," and concluded that "[t]his claim indisputably does not challenge a condition of confinement even under the dissent's broad construction of that term." Slip op. at 10 (emphasis in original).

division demonstrates, the question presented in this petition is of recurring importance to the disposition of prisoner litigation in the federal judicial system and, for that reason alone, warrants review in this Court.[3]

II. The Decision Below Was Incorrect.

As the decision in Clark demonstrates, the Second Circuit erred in construing § 636(b)(1)(B) as it did. By declining to follow the plain meaning of the statutory language, the opinion below deviated from the "general rule of statutory construction [that] where the terms of a statute are unambiguous, judicial inquiry is complete." Adams Fruit Co. v. Barrett, 110 S. Ct. 1384, 1387 (1990).[4] Instead, the Second Circuit relied on a reference to 42 U.S.C. § 1983 in the legislative history, inferring from it that Congress employed the phrase "prisoner petitions challenging the conditions of confinement" in §

3 Perhaps out of a recognition that issues involving the meaning of the Federal Magistrates Act affect a large number of cases in the federal courts, this Court has frequently clarified the meaning of that statute in recent years. See, e.g., United States v. France, 886 F.2d 223 (9th Cir. 1989), cert. granted, 110 S. Ct. 1921 (1990); Gomez v. United States, 109 S. Ct. 2237 (1989) (resolving "important conflict" between Second and Fifth Circuits on meaning of "additional duties" clause of 28 U.S.C. § 636(b)(3)); Thomas v. Arn, 474 U.S. 140 (1985).

4 As the Tenth Circuit pointed out, a "condition" is an ongoing or widespread practice or situation. Cf. Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979).

636(b)(1)(B) to signify all § 1983 actions brought by prisoners.[5] Even assuming that resort to legislative history were appropriate, the Second Circuit's reliance on the references to § 1983 was misplaced. Many such actions brought by prisoners have nothing at all to do with "conditions of confinement," as when a prisoner sues a police officer for pre-conviction conduct.[6] What is more, even the narrower category of § 1983 prisoner suits against prison officials cannot be coextensive with the "prisoner petitions" clause of § 636(b)(1)(B). That category would exclude a prisoner's tort action for widespread food poisoning brought against a private company operating a prison cafeteria, even though such a lawsuit would surely challenge the prisoner's "conditions of confinement." It would also exclude virtually all suits brought by federal prisoners challenging the conditions of confinement in federal prisons, since § 1983 actions require the

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5 The Second Circuit concluded that "Congress evidently wished magistrates to assist district judges with respect to all prisoner claims and selected phrases to describe the two broad categories of prisoner claims cognizable under 28 U.S.C. §§ 2254, 2255 (challenges to convictions) and 42 U.S.C. § 1983 (challenges to conditions of confinement)." 906 F.2d at 839 (emphasis added). See also Clark, slip op. (dissent) at 2 (per Anderson, J.) (citing references in legislative history to § 1983).

6 Indeed, the Second Circuit acknowledged this lack of congruence sub silentio by suggesting that, in order to fall within § 636(b)(1)(B), a § 1983 complaint must be "made by a prisoner against prison officials." 906 F.2d at 839 (emphasis supplied). There is nothing in 28 U.S.C. § 636(b)(1)(B), however, to suggest that only prisoner petitions directed against certain types of parties may be referred to a magistrate without the prisoner's consent. Instead, the subsection clearly targets those prisoner complaints that advance a certain kind of allegation.

deprivation of federal rights by persons acting under color of state law. Thus, contrary to the Second Circuit's view, Congress simply could not have intended § 636(b)(1)(B) to be coextensive with all § 1983 prisoner actions against prison officials.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JAMES EDWARD CLARK,

Plaintiff-Apppellant,

v.

ROBERT POULTON, UTAH STATE CORRECTIONS DEPARTMENT, DAVID JORGENSON, SALT LAKE COUNTY SHERIFF'S OFFICE, and JOHN DOES I through X,

Defendant-Appellees.

No. 88-1177

Appeal from the United States District Court
for the District of Utah
(D.C. No. 86-C-0396W)

Janice M. Church, Holme Roberts & Owen (Jeffrey A. Chase with her on the brief), Denver, Colorado, Attorneys for Plaintiff-Appellant.

Jerry G. Campbell, Deputy County Attorney (David E. Yocom, Salt Lake County Attorney, with him on the brief), Salt Lake City, Utah, for Salt Lake County Defendant-Appellees.

Brent A. Burnett, Assistant Attorney General (R. Paul Van Dam, Attorney General, David L. Wilkinson, Attorney General, Stephen J. Sorenson, Asst. Attorney General, and William F. Bannon, Asst. Attorney General with him on the brief), Salt Lake City, Utah, for Defendant-Appellees Robert Poulton and Utah State Corrections Department.

Before HOLLOWAY, SEYMOUR, and ANDERSON, Circuit Judges.

SEYMOUR, Circuit Judge.

James E. Clark brought this suit under 42 U.S.C. § 1983 (1982) against the Adult Parole Division of the Utah State Corrections Department, parole officer Robert Poulton, the Salt Lake County jail, and David Jorgenson, a transportation officer employed at the jail. Clark alleged that his constitutional rights were violated by two separate incidents of excessive force, and by the denial of medical treatment and of reasonable access to the mails during his pretrial detention in the jail. The district court referred the case to a magistrate pursuant to 28 U.S.C. § 636(b)(1)(B)(1988). The magistrate held an evidentiary hearing and submitted a report recommending that Clark's claims be dismissed. The district court adopted this report and entered judgment accordingly. Clark appeals, asserting that the magistrate had no jurisdiction because the referral was not authorized by statute, that in any event the district court failed to conduct a proper de novo review of the portion of the report to which Clark had objected, and that the magistrate erred in his application of the law. We conclude that the magistrate was without jurisdiction, and we therefore reverse.

I.

BACKGROUND

The relevant facts are briefly as follows. While on parole following state court convictions, Clark returned to Salt Lake

City after an out-of-state visit approved by his parole officer, Poulton, and learned that the police were looking for him in connection with two armed robberies. The day after Clark returned, he reported to Poulton at the Salt Lake County Parole office. Poulton arrested him on suspicion of the armed robberies, handcuffed him, and took him down the hall to be booked. When Clark objected during the booking to being photographed without an attorney, Poulton allegedly pushed Clark against the wall and lifted his handcuffed arms over his head, aggravating a previous back injury. Following his transportation to the jail, Clark purportedly did not receive requested medical treatment for his back for several weeks.

While detained in the jail, Clark and several other inmates were transported to court by Jorgenson. On leaving the courtroom, Clark asked to use the restroom and Jorgenson told him he would have to wait. Because of previous surgery, waiting was difficult and uncomfortable for Clark and he later doubled over in the courthouse elevator. Jorgenson allegedly grabbed Clark's neck and chest and pushed him into the elevator wall, again aggravating his back injury. Clark required physical therapy for a year after his release from jail and sought recovery of these medical expenses as part of his damages.[1]

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[1] Clark spent nine months in the jail pending disposition of the charges against him, one of which was dismissed after his acquittal on the other. During his incarceration, his truck was repossessed, and he could not attend school for which he had

Clark's original complaint was filed May 12, 1986. On May 14, the district court entered an order of reference which stated:

> "IT IS ORDERED that as authorized by 28 U.S.C. § 636(b)(1)(B) and the rules of this court the above entitled case is referred to the magistrate. He is directed to manage the case, to receive all motions filed, hear oral arguments hereon, to conduct evidentiary hearings when proper and make proposed findings of fact, and to submit to the undersigned judge a report and recommendation for the proper resolution of dispositive matters presented."

Rec., vol. I, doc. 2. Pursuant to the order, the magistrate thereafter determined that Clark could proceed in forma pauperis, appointed him counsel, held scheduling and pretrial conferences, conducted an evidentiary hearing (described in the relevant documents as a trial), and issued a report recommending that Clark's claims be dismissed. Clark objected to the report, which the district court summarily adopted in all respects.

II.

REFERENCE TO A MAGISTRATE

We begin our analysis of this issue by examining the jurisdiction and powers of a federal magistrate set out in 28

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already paid tuition. Because of this loss of student status, he also lost the deferral of his student loan repayment. In addition to his medical expenses, Clark sought recovery for these losses, as well as injunctive relief relating to his parole and to the jail's magazine subscription policy. We express no opinion on the relief Clark seeks.

U.S.C. § 636 (1988). Under section 636(b)(1)(A), a judge may designate a magistrate to hear and determine all pretrial matters except for those dispositive motions specifically listed therein.[2] The district court reviews a section 636(b)(1)(A) determination under the same standard that an appeals court applies to a district court determination, ascertaining whether the "order is clearly erroneous or contrary to law." Id.

Under section 636(b)(1)(B), the provision which the district court invoked in this case, a magistrate may be designated to conduct evidentiary hearings and submit reports and recommendations in three types of proceedings: 1) hearings on those dispositive motions excepted in section 636(b)(1)(A); 2) applications by criminal defendants for posttrial relief; and 3) prisoner petitions challenging conditions of confinement.[3] Upon

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[2] Section 636(b)(1)(A) provides:

> "[A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action."

28 U.S.C. § 636(b)(1)(A).

[3] Section 636(b)(1)(B) provides:

> "[A] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the

the objection by a party to the magistrate's proposed findings and recommendations under this section, the district court is required to make a de novo determination. Id.

Section 636(b)(2) allows a judge to appoint a magistrate to serve as a special master, either pursuant to the Federal Rules of Civil Procedure or, upon consent of the parties, without regard to Rule 53(b) of the Federal Rules of Civil Procedure. Section 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3).

Finally, section 636(c)(1) provides that a magistrate "[u]pon consent of the parties . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. § 636(c)(1) (emphasis added). Section 636(c)(2) sets out specific requirements regarding such consent:

> "If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent."

28 U.S.C. § 636(c)(2) (emphasis added). A judgment entered pursuant to Section 636(c)(1) may be appealed either to the court of appeals or to the district court, in the same manner as a district court judgment would be appealed to a court of appeals.[4]

A. Authorization

As we have noted, the district court here stated that the order of reference was made under section 636(b)(1)(B), which applies to hearings on certain dispositive motions, applications for post-conviction relief, and prisoner petitions challenging conditions of confinement. Since no dispositive motion was filed below, and since Clark was not seeking post-conviction relief, the only arguably applicable provision is the one allowing reference of prisoner challenges to conditions of confinement.

Conditions of confinement have been described as "ongoing prison practices and regulations with regard to matters such as

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> court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement."

28 U.S.C. § 636(b)(1)(B).

[4] In addition to the provisions discussed above, section 636(a)(3) grants magistrates the power to conduct trials under 18 U.S.C. § 3401 (1988). Section 3401 gives a magistrate jurisdiction to try and sentence defendants accused of misdemeanors upon special designation by the district court and the written consent of the defendant.

placement in maximum security, deadlocks, unhealthy living conditions, unnecessary exposure to violence-prone inmates, overcrowded physical environments, and cruel or unusual punishment by prison authorities." Hill v. Jenkins, 603 F.2d, 1256, 1260 (7th Cir. 1979) (Swygert, J., concurring). Such ongoing practices do not include "a single incident that occurred in the prison." Id. (concurring on ground that loss of property from prison shakedown not condition of confinement). The above definition has been generally accepted by those courts addressing the issue. See, e.g., Houghton v. Osborne, 834 F.2d 745, 749 (9th Cir. 1987); Hall v. Sharpe, 812 F.2d 644, 647 n.1 (11th Cir. 1987); Wimmer v. Cook, 774 F.2d 68, 74 n.9 (4th Cir. 1985); Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982); but see McCarthy v. Brown, 906 F.2d 835, 839 (2d Cir. 1990). This definition, which we likewise adopt, does not encompass the two instances of the use of excessive force alleged by Clark. Those incidents, one of which occurred before Clark was even admitted to the jail, are clearly isolated events rather than part of a series of ongoing jail practices. Accordingly, the reference to the magistrate of the claims is not authorized by section 636(b)(1)(B).

The dissent's characterization of our construction of "conditions of confinement" as unsupported by reason or authority is simply wrong. As the dissent recognizes, only two circuits have reached decisions contrary to the construction we adopt in this opinion, and only one of those circuits has explicitly

disagreed with it. See McCarthy, 906 F.2d at 839. The court in McCarthy relied on Branch v. Martin, 886 F.2d 1043 (8th Cir. 1989), in which the court noted in passing that "[t]he term 'conditions of confinement' has been interpreted expansively to include almost any prisoner § 1983 action challenging 'the type of confinement, and matters concerning health, safety, or punishment.'" 886 F.2d at 1045 n.1 (quoting Houghton v. Osborne, 834 F.2d 745, 749-50 (9th Cir. 1987), and citing additional cases). However, the cases cited in Branch do not support McCarthy's holding because they involve claims falling within our construction of the statute, with the exception of Archie v. Christian, 808 F.2d 1132 (5th Cir. 1987), which does not describe the challenged conduct, and Cay v. Estelle, 789 F.2d 318 (5th Cir. 1986), which does not address the condition-of-confinement issue.

Moreover, our construction is grounded, as it must be, on the plain and commonly understood meaning of the word "condition." See Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). "Condition" is defined as "existing state of affairs," and "a mode or state of being." Webster's Third New International Dictionary 473 (1981). The word thus clearly connotes an ongoing situation as opposed to an isolated incident. The court in McCarthy and the dissent here improperly defend their refusal to give effect to this plain

meaning as justified by Congressional policy. The law, however, is to the contrary. "[I]t should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses." Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984).

Finally, we note that one of Clark's excessive force claims arises from an alleged incident occurring before he was jailed and involving his probation officer. This claim indisputably does not challenge a condition of confinement even under the dissent's broad construction of that term.

Nor is the reference authorized under section 636(b)(3), which permits assignment to the magistrate of additional duties not inconsistent with the Constitution and federal law. This conclusion is compelled by the Supreme Court's analysis in Gomez v. United States, 109 S. Ct. 2237 (1989), in which the Court considered the scope of section 636(b)(3). In Gomez, a magistrate had empaneled a jury in a felony trial over the objection of the defendants. In reversing the defendants' convictions, the Supreme Court concluded that the additional-duties clause, when considered in the context of the overall statutory scheme, does not encompass the seating of a jury in a felony trial.

In reaching this conclusion, the Court relied upon two established canons of statutory construction which apply with

equal force in the instant case. First, the Court followed its "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." Id. at 2241. The Court thus obviated the need to consider the constitutionality of assigning felony jury selection to a magistrate under section 636(b)(3) by determining that section 636(b)(3) itself did not authorize such an assignment. In so doing, the Court applied a second principle, stating that in interpreting a statute a court must not be "'guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" Id. (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)). The Court then reviewed the Act as a whole in light of its evolution and legislative history and concluded that while a literal reading of section 636(b)(3) in isolation would encompass the assignment of the duties at issue, "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." Id. at 2245.

Applying these principles to the instant facts, we hold that section 636(b)(3) does not authorize a district court to designate a magistrate to conduct a hearing on a prisoner's petition that does not challenge a condition of confinement. Gomez precludes both construing section 636(b)(3) in isolation, and upholding the

assignment of additional duties on constitutional grounds without first ascertaining whether the assignment is authorized by the statute when considered as a whole. Here, section 636(b)(1)(B) carefully limits a magistrate's authority to conduct hearings on prisoner petitions, extending that authority only to petitions challenging conditions of confinement. Under Gomez, this articulation of specific duties must be construed as implicitly withholding other duties not so specified, particularly when, as here, the contrary construction would in effect render the specific limitations a nullity.[5] See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) ("elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

Defendants argue on appeal that the reference can be upheld under section 636(c). We disagree. While section 636(c) permits a magistrate to conduct a trial in a civil matter, neither the district court nor the magistrate here purported to act pursuant to that provision. Moreover, magistrate jurisdiction to proceed

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5 The dissent cites Marvel v. United States, 719 F.2d 1507 (10th Cir. 1983), for the proposition that "the majority's construction of the statute does not avoid deciding a constitutional issue, for this court has already held that Article III allows a magistrate to preside over a civil matter so long as the district court reviews the matter de novo." Dissent at 4 n.2. Marvel is totally inapposite inasmuch as the parties there consented to trial before the magistrate. See 719 F.2d at 1512 ("[W]e hold there is ample statutory authority under 28 U.S.C. § 636(b)(2) to refer a civil case to a federal magistrate for trial on the merits, provided the parties consent to such a procedure.")

under section 636(c) requires a special designation by the district court, id. § 636(c)(1), and the consent of the parties communicated to the clerk of court, id, § 636(c)(2), neither of which is present here.[6] In finding the prerequisites for magistrate jurisdiction under section 636(c) lacking here, we join the great weight of authority and hold that consent under section 636(c)(2) must be explicit and cannot be inferred from the conduct of the parties. See Securities & Exchange Comm'n v. American Principals Holdings (In re San Vicente Medical Partners Ltd.), 865 F.2d 1128 (9th Cir. 1989); Silberstein v. Silberstein, 859 F.2d 40 (7th Cir. 1988); Hall v. Sharpe, 812 F.2d at 647; Wimmer, 774 F.2d at 76; Ambrose v. Welch, 729 F.2d 1084 (6th Cir. 1984); but see Archie v. Christian, 808 F.2d 1132 (5th Cir. 1987)(en banc).

B. Jurisdiction

Given our conclusion that the reference was unauthorized, we must consider the significance, if any, of Clark's failure to object to proceeding before the magistrate. The majority of circuits that considered the issue prior to the Gomez decision

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6 Section 636(c)(2) also states that "[r]ules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." Our examination of the Civil Rules of Practice of the United States District Court for the District of Utah reveals no provision for the reference of civil trials to a magistrate. To the contrary, magistrates do not generally even conduct final pre-trial conferences, see Rule 9(d), and are specifically precluded from entering any order dispositive of a substantive issue in the case, see Rule 9(i).

concluded that an improper reference is a matter of jurisdiction and therefore not subject to waiver or harmless-error analysis.

For example, in Houghton v. Osborne, 834 F.2d 745, the Ninth Circuit considered facts closely analogous to those before us. There the district court had referred a prisoner's civil rights action to a magistrate, who held an evidentiary hearing on the merits of the claim and filed proposed findings and recommendations that were adopted by the district court. On appeal, the court held sua sponte that the prisoner's claim did not challenge a condition of confinement, and that the district court therefore "lacked the jurisdiction to refer this matter to the magistrate to conduct an evidentiary hearing on the merits of Houghton's 1983 action." Id. at 750. Similarly, in Hall the district court purported to refer a prisoner's civil rights suit to a magistrate under sections 636(b)(1) and (b)(3) for a trial before an advisory jury. The magistrate issued a report recommending acceptance of the jury verdict, which the district court adopted in entering final judgment against the plaintiff. On appeal, the Eleventh Circuit concluded that "the district court's referral of this case was not authorized by any provision of the Magistrate's Act, 28 U.S.C. § 636, and thus the magistrate was without jurisdiction to conduct the trial." 812 F.2d at 646; see also Lovelace v. Dall, 820 F.2d 223 (7th Cir. 1987)(per curiam) (unambiguous consent of parties required for magistrate to have jurisdiction to enter final judgment under section 636(c));

Frank v. Arnold (In re Morrissey), 717 F.2d [illegible] (3d Cir. 1983) (magistrate had no jurisdiction to hear appeal from bankruptcy court order notwithstanding parties' express consent); Taylor v. Oxford, 575 F.2d 152 (7th Cir. 1978) (magistrate had no jurisdiction over motion to dismiss for failure to state claim referred under section 636(b)(3) for final disposition pursuant to parties' stipulation and local rule); but see Archie v. Christian, 808 F.2d 1132, at 1134-35 (5th Cir. 1987)(en banc) (improper reference under sections 636(b)(1)(B) and (b)(3) matter of procedure rather than jurisdiction).[7]

In Gomez, the defendants had objected to the assignment to the magistrate, but they made no special claim of prejudice on appeal and the government therefore contended that the error was harmless. The Supreme Court rejected this argument, stating that "harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." 109 S. Ct. at 2248 (emphasis added).

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[7] The dissent asserts that our reliance on Houghton, Lovelace, and In re Morrissey is questionable because those cases do not specifically address the failure to object to an unauthorized reference. The short answer to the dissent's objection is that a determination that the issue is jurisdictional simply obviates the need to address a failure to object. Lack of subject-matter jurisdiction renders lack of objection irrelevant. See, e.g., 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3801 at 7 (2d ed. 1986) (subject matter jurisdiction cannot be waived by the parties).

Notwithstanding this language, courts subsequent to Gomez have varied in their assessment of the relevance of that opinion to cases in which the defendant did not object to the magistrate's unauthorized acts. In United States v. Mang Sun Wong, 884 F.2d 1537, 1544-46 (2d Cir. 1989) (order on petition for rehearing), cert. denied, 110 S. Ct. 1140 (1990), a majority of the panel distinguished Gomez, read it narrowly, and held without analyzing the jurisdictional issue that Gomez does not require reversal when the defendant consented to the magistrate's improper exercise of power. Judge Altimari dissented, concluding that the issue is one of jurisdiction, and that consent is therefore irrelevant because it "cannot enlarge those powers of office not granted by the Federal Magistrates Act." Id. at 1546. See also United States v. Mussacchia, 900 F.2d 493 (2d Cir. 1990)(following Mang Sun Wong, one judge dissenting).

In United States v. France, 886 F.2d 223 (9th Cir. 1989), cert. granted, 110 S. Ct. 1921 (1990), however, the court held Gomez applicable to all cases pending on direct appeal, including those in which the defendant did not object to the magistrate's jury selection. The court did not address the jurisdictional issue, grounding its decision intead on its conclusion that Gomez announced a new rule appropriate for retroactive application, and that under Ninth Circuit precedent France had not waived his entitlement to the rule by failing to object at trial. The court did emphasize several times the Supreme Court's references in

Gomez to tne magistrate's lack of "jurisdict n" and "power." Id. at 226 & n.1.

In United States v. Wey, 895 F.2d 429 (7th Cir. 1990), the Seventh Circuit held that subject matter jurisdiction is not involved and that the unauthorized exercise of power was therefore subject to waiver. The case is thus contrary to the Seventh Circuit's decisions in Lovelace, 820 F.2d at 225-26 & n.3, and Taylor, 575 F.2d at 154, in which the court held that the magistrate's power under the Act is a matter of jurisdiction and that the parties cannot confer jurisdiction which the magistrate does not possess by failing to object. The court in Wey relied in part on the First Circuit decision in United States v. Lopez-Pena, 890 F.2d 490 (1st Cir. 1989), which was withdrawn upon the grant of rehearing en banc.

In its subsequent en banc opinion, the First Circuit emphasized the jurisdictional language in Gomez, and then agreed with France, 886 F.2d 223, that Gomez must be applied where the magistrate was permitted to empanel the jury, notwithstanding the failure to object. See United States v. Martinez-Torres, ___ F.2d ___, Nos. 87-2006, 87-2007, 87-2008 (1st Cir. Aug. 20, 1990). In so doing, the First Circuit expressly disapproved of the opinions in Wey and Mang Sun Wong, and criticized the discussion of consent in Virgin Islands v. Williams, 892 F.2d 305, 309-12 (3d Cir. 1989), cert. denied, 110 S. Ct. 2211 (1990).

We also disagree with the analysis in Williams. There, the court appeared to hold that the issue of the magistrate's power is a jurisdictional matter but nonetheless is subject to waiver. In so doing, the court construed section 636(b)(3) in isolation in direct contradiction to the analysis in Gomez, held that the section authorizes the very reference Gomez specifically held to be unauthorized, and then decided the constitutional issue Gomez deliberately avoided. The concurrence in Williams concluded that, although the magistrate's power raises an issue of jurisdiction, Gomez does not preclude plain error analysis, and the magistrate's unauthorized exercise of power was not plain error.

In our view, the Supreme Court's language and analysis in Gomez, and the language of the Act itself, compel the conclusion that a magistrate's power under the Act is a jurisdictional issue not subject to waiver. The Act speaks in terms of a magistrate's exercise of jurisdiction, see 28 U.S.C. §§ 636(c)(1) and (2), and Gomez repeatedly refers to a magistrate's jurisdiction. In Parts III and IV of Gomez, the Court traced the evolution of the powers of federal magistrates and reviewed the current authority conferred by the Federal Magistrates Act of 1979. See 109 S. Ct. at 2242-47. That discussion is couched in terms of Congressional grants of and limitations upon jurisdiction.

The court in Wey discounted the obvious impact of the use of the term "jurisdiction" by Congress and the Supreme Court. Instead, the court adopted a plain error rule, observing that although the magistrate's conduct at issue was unauthorized, the district court had subject matter jurisdiction under the relevant jurisdictional statutes. This result ignores the fact that while the limitations in the Magistrate Act do restrict a magistrate's authority to act in a case properly before the district court, the Act also restricts the district court's power to refer a matter to a magistrate. Congressionally imposed limits on the exercise of judicial power other than the delineation of subject matter jurisdiction are nonetheless jurisdictional. See Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330 (1938); 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3526 at 227-28 (2d ed. 1984).

> "[T]he jurisdiction of a magistrate to decide a case is not based solely on the consent of the parties, but derives from a proper designation by the district court. Because district court jurisdiction is statutory, its ability to make a proper designation of, and thereby to confer jurisdiction on, a magistrate is also a creature of statute."

In re Morrissey, 717 F.2d at 102.

We simply cannot accept an analysis under which parties by their conduct may extend the jurisdiction of both the magistrate and the district court beyond that established by Congress. We

therefore hold that the magistrate in this case was without jurisdiction to hear the excessive force claims.[8]

III.

Accordingly, we vacate the judgment dismissing Clark's claims and remand to the district court for further proceeding consistent with this opinion.[9]

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[8] We recognize that two of Clark's claims, his allegations of denial of medical treatment while in the jail and his challenge to the jail magazine policy, do challenge conditions of confinement. However, those claims were consolidated by agreement of the parties with Clark's excessive force claims. Given our conclusion that the parties may not consent to the magistrate's exercise of a power withheld by Congress, the parties' consent here to consolidation cannot vest the magistrate with jurisdiction over claims not referable to him.

[9] We note Clark's argument that the district court did not make the required de novo review of those portions of the magistrate's report to which Clark objected. In view of our conclusion that this case must be remanded in any event, we need not address this argument other than to observe that our opinion in Gee v. Estes, 829 F.2d 1005, 1008-09 (10th Cir. 1987), is available for the guidance of the court on this issue on remand.

88-1177, Clark v. Poulton

ANDERSON, Circuit Judge, dissenting:

I respectfully dissent. The referral of this case to the magistrate was authorized by the statute. Furthermore, Clark waived his right to challenge the magistrate's authority by failing to object below. The judgment should be affirmed.

I.

A.

The referral was authorized by the provision in 28 U.S.C. § 636(b)(1)(B) for "prisoner petitions challenging conditions of confinement." The majority errs by adopting the narrow formulation of Judge Swygert's concurrence in Hill v. Jenkins, 603 F.2d 1256, 1259-60 (7th Cir. 1979), which is not supported by reason or authority.[1] This court should follow the two circuits which have interpreted section 636(b)(1)(B) to authorize the referral to a magistrate of prisoner suits complaining of specific incidents. See McCarthy v. Bronson, 906 F.2d 835, 839 (2d Cir. 1990);

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[1] Judge Swygert's concurrence cites no authority for his narrow construction of the statute, and the cases adopting his construction cite no authority other than the concurrence and the other cases adopting it.

In addition, it is not clear that the Eleventh Circuit agrees with Judge Swygert. Hall v. Sharpe, 812 F.2d 644, 647 n.1 (11th Cir. 1987), involved a complaint alleging a single incident, but the judgment below was reversed not because the incident was not a condition of confinement, but because section 636(b)(1)(B) does not authorize magistrates to preside over jury trials. Because the citation in Hall to Hill is dictum, "only two circuits," supra at ___, clearly interpret "conditions of confinement" to exclude single incidents.

Thompson v. Nix, 89[illegible].2d 356, 357 (8th Cir. 19); Branch v. Martin, 886 F.2d 1043, 1045 & n.1 (8th Cir. 1989).[2]

> "Subsection 636(b)(1)(B) was added in 1976 as part of a broadening of the authority of magistrates. Act of Oct. 21, 1976, Pub. L. 94-577, 90 Stat. 2729. The House Report does not explain the category 'prisoner petitions challenging conditions of confinement' but does refer to 'petitions under section 1983 of Title 42.' H.R. Rep. No. 1609, 94th Cong., 2d Sess. 11, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6171. . . .
>
> We see no reason why a Magistrate with clear authority to hold hearings and recommend findings as to the unconstitutionality of continuing prison conditions may not perform a similar function as to specific episodes of unconstitutional conduct by prison officials. The phrase 'conditions of confinement' appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all grievances occurring during prison confinement."

McCarthy v. Bronson, 906 F.2d at 839.

According to the majority, a suit alleging that a prisoner was beaten once must be heard by an Article III judge, but a claim that the prisoner is beaten daily may be referred to a magistrate. Limiting the magistrate's jurisdiction to the more serious claim

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[2] The majority's suggestion that the Eighth Circuit does not disagree with their interpretation of the statute is incorrect. That court has approved the referral to a magistrate, as "prisoner petitions challenging conditions of confinement," a claim that prison officials "assault[ed the plaintiff] on two occasions," Thompson v. Nix, 897 F.2d at 357, and a claim that "on September 10, 1986, when defendants escorted [plaintiff] from a waiting room to his cell, defendants used excessive force against him," Branch v. Martin, 886 F.2d at 1044. Moreover, some of the cases cited in Branch fall outside the majority's construction of the statute. The plaintiff in Gee v. Estes, 829 F.2d 1005, 1006 (10th Cir. 1987), alleged, inter alia, an incident where "he was dragged into court with no clothing on except an oversized pair of trousers which dropped to his knees to expose him to the spectators." The plaintiff in Cay v. Estelle, 789 F.2d 318, 319 (5th Cir. 1986), alleged "that on August 3, 1982, when [he] asked to be relieved from work duties because of a back injury, he was beaten severely . . . ."

makes no sense, and nothing in the legislative history persuades me that Congress intended such an anomaly. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."). Their interpretation conflicts with the legislative intention to give magistrates broad authority to assist judges. See H.R. Rep. No. 1609, 94th Cong., 2d Sess. 6-8, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6166-68.

One of the incidents in this case occurred shortly after Clark was arrested. The other took place while he was in pretrial detention. At neither time was he free to leave. Certainly, he was in confinement.[3] See Wimmer v. Cook, 774 F.2d 68, 69, 74 (4th Cir. 1985) (pretrial detention); see also Worley v. Sharp, 724 F.2d 862, 863 (10th Cir. 1983) (same), reh'g denied, 759 F.2d 786 (10th Cir. 1985). Because his complaint challenged conditions of his confinement, section 636(b)(1)(B) authorized the referral.

B.

If the referral was not authorized by that subsection, it was authorized by section 636(b)(3). The articulation of specific

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[3] "Confinement" is the "[s]tate of being confined" or "shut in" "by either a moral or a physical restraint, by threats of violence with a present force, or by physical restraint of the person." Black's Law Dictionary 157 (abr. 5th ed. 1983).

duties in subsection (b)(1)(B) did not "implicitly withhold[] other duties not so specified . . . ." Supra at ___. Subsection (b)(3) is a "'catchall' provision." Garcia v. Boldin, 691 F.2d 1172, 1178 (5th Cir. 1982); accord, e.g., King v. Ionization Int'l, Inc., 825 F.2d 1180, 1185 (7th Cir. 1987). "Where the district court is not specifically empowered to refer a case, it may do so under the general provision of 28 U.S.C. § 636(b)(3) . . . ." Hall v. Vance, 887 F.2d 1041, 1046 (10th Cir. 1989).

In Mathews v. Weber, 423 U.S. 261 (1976), the Supreme Court reviewed the legislative history of the original Act:

> "The three examples § 636(b) sets out are, as the statute itself states, not exclusive. The Senate sponsor of the legislation, Senator Tydings, testified in the House hearings:
>
> 'The Magistrate[s] Act specifies these three areas because they came up in our hearings and we thought they were areas in which the district courts might be able to benefit from the magistrate's services. We did not limit the courts to the areas mentioned. . . .
>
> 'We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts.'"

Id. at 267 (quoting Hearings on the Federal Magistrates Act Before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong., 2d Sess. 81 (1968)). The legislative history of the 1976 amendments to the Act confirms the expansiveness of subsection (b)(3):

> "This subsection enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates."

H.R. Rep. No. 1609, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6172 (emphasis added). The statutory authorization for referring to magistrates prisoner petitions challenging conditions of confinement was not meant as a bar to the referral of prisoner petitions unrelated to conditions of confinement.[4] See, e.g., John v. Louisiana, 899 F.2d 1441, 1446 (5th Cir. 1990) (subsection (b)(3) authorizes post-trial referral of sanctions question even though subsection (b)(1)(A) only refers to pretrial matters).

As is true of the majority's construction of subsection (b)(1)(B), their construction of subsection (b)(3) has absurd consequences. If (b)(3) only applies to matters not addressed in (b)(1), then a suit by a prisoner about something which preceded

[4] Gomez v. United States, 109 S. Ct. 2237 (1989), does not require a contrary conclusion. There, the Court concluded that "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial," id. at 2245, because

> "[w]hen a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties."

Id. at 2241. Presiding over a felony trial bears no relation to the duties specified in the statute, but presiding over a prisoner's section 1983 action does.

Also, unlike in Gomez, the majority's construction of the statute does not avoid deciding a constitutional issue, for this court has already held that Article III allows a magistrate to preside over a civil matter so long as the district court reviews the matter de novo. Marvel v. United States, 719 F.2d 1507, 1513 (10th Cir. 1983). (That the parties in that case consented to proceeding before the magistrate is irrelevant, for parties cannot expand Article III limitations on a tribunal's jurisdiction. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).)

his confinement may not be referred to a magistrate (because it is "a prisoner's petition that does not challenge a condition of confinement," supra at ___) but a suit by a non-prisoner making an identical allegation may be.

II.

I also disagree with the majority's conclusion that the absence of statutory authorization for a magistrate's participation is a non-waivable jurisdictional defect. I would hold that the issue was waived by Clark's failure to object below.

The authority upon which the majority relies does not support its conclusion. Many of the cited cases do not address the effect of a failure to object to a referral to a magistrate. See Gomez v. United States, 109 S. Ct. 2237 (1989); Houghton v. Osborne, 834 F.2d 745 (9th Cir. 1987); Lovelace v. Dall, 820 F.2d 223 (7th Cir. 1987); In re Morrissey, 717 F.2d 100 (3d Cir. 1983). In the others, the failure to object was excused on grounds other than non-waivability. See United States v. Martinez-Torres, ___ F.2d ___, ___ & n.3, Nos. 87-2006, -2007, -2008 (1st Cir. Aug. 20, 1990) (objection would have been futile because of existing circuit authority); United States v. France, 886 F.2d 223, 228 (9th Cir. 1989) (same), cert. granted, 110 S. Ct. 1921 (U.S. 1990)[5]; Hall v. Sharpe, 812 F.2d 644, 649 (11th Cir. 1987) (appellant was allowed to rely upon the appellee's objection to proceeding before a magistrate). Taylor v. Oxford, 575 F.2d 152, 154-55 (7th Cir. 1978), appears to agree with the majority, but that opinion, as well as Lovelace v. Dall, 820 F.2d 223 (7th Cir. 1987), has been superseded by United States v. Wey, 895 F.2d 429 (7th Cir.), cert. denied, 110 S. Ct. 3283 (1990).[6]

The cases which consider the issue hold that a magistrate's lack of statutory authority is not a jurisdictional defect, so any objection is waived if not raised. See id. at 431; Mylett v. Jeane, 879 F.2d 1272, 1275 (5th Cir. 1989); United States v. Vanwort, 887 F.2d 375, 382-83 (2d Cir. 1989), cert. denied, 110 S. Ct. 1927 (1990); see also Government of the Virgin Islands v. Williams, 892 F.2d 305, 309-312 (3d Cir. 1989) (failure to object constitutes consent to reference), cert. denied, 110 S. Ct. 2211 (1990).[7]

Any error below was a procedural lapse, not a jurisdictional failing. Archie v. Christian, 808 F.2d 1132, 1134-35 (5th Cir. 1987). "We do not have a 'jurisdictional' problem . . . . We have at most a mistaken interpretation of a law designating which

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[5] While the Ninth Circuit decided the case on different grounds, one of the issues before the Supreme Court, to be heard Tuesday, October 2, is whether a magistrate's lack of statutory authority is a non-waivable defect. See Brief of the United States at 19-21, United States v. France, No. 89-1363 (U.S. certiorari granted Apr. 24, 1990). In my view, we should "decline appellant's invitation to rule in a vacuum," United States v. De La Cruz, 902 F.2d 121, 125 (1st Cir. 1990), and await the Court's decision before deciding the instant case. Deciding the matter immediately serves little purpose, but risks wasting judicial resources.

[6] Similarly, Government of the Virgin Islands v. Williams, 892 F.2d 305 (3d Cir. 1989), calls In re Morrissey, 717 F.2d 100 (3d Cir. 1983), into doubt.

[7] A panel of the First Circuit also reached this conclusion in United States v. Lopez-Pena, 890 F.2d 490, 495 n.6 (1st Cir. 1989) (advance edition), but the opinion was withdrawn so the case could be reheard en banc and the en banc opinion does not address the issue. See United States v. Martinez-Torres, ___ F.2d at ___ n.8 (Selya, J., dissenting).

judicial officer shall preside over which proceedings." United States v. Wey, 895 F.2d at 431.

Gomez does not control, for the appellant there did object to the magistrate's involvement. United States v. Sawyers, 902 F.2d 1217, 1220 (6th Cir. 1990); United States v. Mang Sun Wong, 884 F.2d 1537, 1545 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990). Gomez's mention of "jurisdiction" does not mean that the Act is a jurisdictional statute. "[T]he word is a many-hued term . . . . Gomez uses the word 'jurisdiction' in a context revealing that the Court meant 'authority.'" United States v. Wey, 895 F.2d at 431; accord United States v. Musacchia, 900 F.2d 493, 503 (2d Cir. 1990) (court is "[u]nable to square the Supreme Court's use of the word 'jurisdiction' with traditional notions of subject matter jurisdiction"); Black's Law Dictionary 443 (abr. 5th ed. 1983) ("The word is a term of large and comprehensive import, and embraces every kind of judicial action.").

III.

On August 18, 1987, the magistrate held an evidentiary hearing, which was recorded. On September 16, he recommended that Clark's suit be dismissed. Clark objected to this recommendation, but on December 31 the district court dismissed the action. The dismissal order states that the court "made a de novo review" of the case, R. Vol. I, Tab 49, at 2, but the recording of the evidentiary hearing had not yet been transcribed.

"When objections are made to the magistrate's factual findings based on conflicting testimony or evidence, both § 636(b)(1)

and Article III of the United States Constitution require de novo review." Gee v. Estes, 829 F.2d 1005, 1008 (10th Cir. 1987). "In conducting this review, the district court must, at a minimum, listen to a tape recording or read a transcript of the evidentiary hearing." Id. at 1009.

Gee was decided three months before the district court dismissed Clark's action. We presume that the district court knew the relevant law, United States v. Lowden, 905 F.2d 1448, 1449 n.1 (10th Cir. 1990), so the court's statement that it conducted a de novo review must be taken to mean that it listened to the tape recording of the hearing before it dismissed Clark's suit. Indeed, because of the expense and delay[8] of transcription, district courts commonly listen to a tape rather than await a transcript.

Branch v. Martin, 886 F.2d 1043 (8th Cir. 1989), which remanded in similar circumstances, is distinguishable. As here, the district court adopted the magistrate's recommendations before the transcript of a recorded hearing was prepared. As here, the district court stated that it had conducted a de novo review, but did not say anything about listening to the tape. Id. at 1046; see also Moran v. Morris, 665 F.2d 900, 901-02 (9th Cir. 1981) (court of appeals remanded for further review of tape-recorded proceedings before magistrate after district court adopted magistrate's recommendations the day they were issued). The important distinction is that Branch announced for the Eighth

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[8] The transcript in this case was not prepared until almost 14 months after the hearing was held. See R. Supp. Vol. II.

Circuit the rule ..e adopted in Gee. The dis .ct court in Branch did not have the benefit of that decision, but the court below was aware of Gee. The doubts the Eighth Circuit held about the breadth of that district court's review would be unfounded here.

IV.

On the merits of Clark's claims, I agree with the decision of the district court. Accordingly, I would affirm the judgment.

F.2d 605, 610 (1st Cir.1990); *United States v. Nasworthy*, 710 F.Supp. 1353, 1355 (S.D. Fla.1989); *see generally Montana v. United States*, 440 U.S. 147, 153–55, 99 S.Ct. 970, 973–74, 59 L.Ed.2d 210 (applying "laboring oar" analysis in civil context).

[9] We need not refine the somewhat ambiguous contours of this test, since appellees' contentions fall far short of showing the kind of close relationship that would meet even the lower hurdle of active participation.

At a minimum, it must be shown that federal prosecutors actively aided the state prosecutors during the local suppression hearing. Only then can it be said that their interests in enforcing federal law were sufficiently represented. The record here is totally barren of evidence of such control or participation. No federal prosecutors were present in Judge Fromer's courtroom during the suppression hearing. Nothing indicates that they provided assistance or advice to the local authorities at any time, or were involved in any way with the local prosecution or the decision not to appeal the suppression order.

Accordingly, in the circumstances of this case, we cannot say that the federal government was in privity with the state prosecution. Appellees have not met their minimum burden, to establish that the United States played a role as a "laboring oar" in the conduct of the state proceedings.

We note that even if the necessary identity of parties existed through privity, collateral estoppel would be inappropriate unless the issue resolved in the first proceeding was the same as the issue sought to be relitigated. *See Dowling v. United States*, — U.S. —, 110 S.Ct. 668, 673, 107 L.Ed.2d 708 (1990); *Montana*, 440 U.S. at 153, 99 S.Ct. at 973. It is unclear whether the state suppression order was premised on the Fourth Amendment or on state law. In federal court, however, evidence should be suppressed only where federal law has been violated and the federal exclusionary rule applies. The Supreme Court has stressed that

> a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.

Elkins v. United States, 364 U.S. 206, 224, 80 S.Ct. 1437, 1447, 4 L.Ed.2d 1669 (1960). For this reason as well, it would be improper to deny the government an opportunity to present its arguments at a federal suppression hearing.

We have considered all of appellees' additional arguments and have found them to be without merit.

CONCLUSION

In sum, we are not holding that a federal prosecution can never be precluded from offering evidence that has been suppressed in a state prosecution. We are holding that to justify such an order of suppression the level of federal participation in the state prosecution must be of substantially greater magnitude than displayed here.

The judgment of the district court is reversed and we remand for disposition consistent with this opinion.

John J. McCARTHY, Plaintiff–Appellant,

v.

George BRONSON, Warden, Lt. Steve T. Ozier, Officer Paul Lusa, and Officer Michiewicz, Individually and in their official capacities as Officers of the Connecticut Department of Correction, Defendants–Appellees.

No. 651, Docket 89–2389.

United States Court of Appeals, Second Circuit.

Submitted March 1, 1990.

Decided June 22, 1990.

Prisoner brought action challenging actions taken by prison officials. The Unit-

ed States District Court for the District of Connecticut, José A. Cabranes, J., entered judgment in favor of defendants, and prisoner appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) proceedings before magistrate were proper, and (2) prisoner waived right to jury trial by agreeing to trial before magistrate, even though he later revoked that consent.

Affirmed.

1. **United States Magistrates** ⇐13

Because magistrate could have declined to have vacated consent to trial by magistrate, he could take the lesser step of agreeing to hear the evidence and submitting recommended findings to the district judge. 28 U.S.C.A. § 636(b)(1)(B), (c).

2. **United States Magistrates** ⇐21

Statute authorizing district judge to refer prisoner's petition challenging the "conditions of confinement" to a magistrate for recommended findings applies in cases challenging a specific episode of allegedly unconstitutional conduct, not merely those challenging continuing prison conditions. 28 U.S.C.A. § 636(b)(1)(B).

See publication Words and Phrases for other judicial constructions and definitions.

3. **United States Magistrates** ⇐29

It would have been improper for court to treat findings of magistrate in action challenging conditions of confinement of prisoner as the report of a special master and to accept the findings as not clearly erroneous. 28 U.S.C.A. § 636(b)(1, 2); Fed. Rules Civ.Proc.Rule 53(e)(2), 28 U.S.C.A.

4. **United States Magistrates** ⇐26

District court which did not confine review of magistrate's findings in action brought by prisoner challenging conditions of confinement to the narrow scope appropriate for findings of a special master but also explicitly determined that, upon a de novo determination, it would reach the same conclusions as the magistrate adequately fulfilled its responsibilities with respect to review of the magistrate's report. 28 U.S.C.A. § 636(b)(1).

5. **Jury** ⇐25(6)

The "last pleading directed to" an issue is not the pleading that raises the issue, but, rather, the pleading that contests the issue, which is normally an answer or a reply to a counterclaim, and it is the filing of that document which starts the ten-day period within which a demand for jury trial must be filed. Fed.Rules Civ.Proc.Rule 38(b, d), 28 U.S.C.A.

6. **Jury** ⇐25(6)

Where answer to second amended complaint was not filed until after plaintiff had demanded jury, there was no waiver of right to jury by reason of late demand where no answer was filed to the original complaint or the first amended complaint. Fed.Rules Civ.Proc.Rule 38(b, d), 28 U.S.C.A.

7. **Jury** ⇐28(1)

Fact that plaintiff did not object to proceeding without a jury at the start of the hearing before the magistrate did not waive right to jury trial where the jury claim had previously been challenged by the defendant and adjudicated by the district court.

8. **Jury** ⇐28(6)

Prisoner waived entitlement to jury in action challenging action taken by prison officials when he consented to trial before magistrate, even though he later revoked that consent. 28 U.S.C.A. § 636(c); Fed. Rules Civ.Proc.Rule 39(a), 28 U.S.C.A.

9. **Jury** ⇐28(1)

Waiver of right to jury which occurred when plaintiff agreed to trial before magistrate was not rendered invalid because it occurred prior to the filing of the defendant's answer. 28 U.S.C.A. § 636(c); Fed. Rules Civ.Proc.Rule 39(a), 28 U.S.C.A.

10. **Jury** ⇐28(1)

There is no starting time for waiver of right to jury trial and waiver may be agreed to even before lawsuit arises. Fed. Rules Civ.Proc.Rule 39(a), 28 U.S.C.A.

11. **Federal Courts** ⇐694

Prisoner was not entitled to free transcript of hearing before magistrate where the issues on appeal did not require examination of the evidence presented at the hearing before the magistrate. 28 U.S.C.A. § 753(f).

John J. McCarthy, Leavenworth, Kan., pro se.

Clarine Nardi Riddle, Atty. Gen., Steven R. Strom, Asst. Atty. Gen., Hartford, Conn., for defendants-appellees.

Before OAKES, Chief Judge, NEWMAN and WALKER, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

John J. McCarthy, a state prisoner, appeals *pro se* from the June 19, 1989, judgment of the District Court for the District of Connecticut (José A. Cabranes, Judge) in favor of the defendant state prison officials. McCarthy sued under 42 U.S.C. § 1983 (1982), alleging unlawful removal from his cell and use of excessive force. The judgment was entered after a hearing conducted by Magistrate F. Owen Eagan. The case is complicated by some uncertainty as to the authority of the Magistrate in recommending proposed findings to the District Judge and the authority of the District Judge in approving those recommended findings. The appeal challenges procedural irregularities concerning the reference to the Magistrate, the lack of a jury trial, the denial of a free copy of a hearing transcript, and the merits of the fact-finding. We affirm.

Before setting forth the procedural facts, it will be helpful to outline pertinent provisions of the Federal Magistrates Act, 28 U.S.C. §§ 631-39 (1982 & Supp. V 1987). Four types of reference from a district judge to a magistrate are implicated in this case. First, subsection 636(b)(1) permits a judge to designate a magistrate to handle pretrial matters, with the Magistrate authorized by subsection 636(b)(1)(A) to rule on most pretrial motions and authorized by subsection 636(b)(1)(B) to recommend rulings on motions excepted from subsection 636(b)(1)(A). Second, subsection 636(b)(1)(B) also permits a judge to designate a magistrate "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court ... of prisoner petitions challenging conditions of confinement." Third, subsection 636(b)(2) permits a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of [Title 28] and the Federal Rules of Civil Procedure." This subsection also permits a judge to designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to Fed.R.Civ.P. 53(b), which limits use of a master to exceptional cases. Fourth, subsection 636(c) permits a magistrate, upon consent of the parties, to try any civil case and render a judgment.

Background

Plaintiff's original complaint, filed in April, 1983, alleged that various officials at the Connecticut Correctional Institution at Somers had ordered or carried out his forcible removal from his prison cell by means of tear gas and excessive force, in violation of the Eighth and Fourteenth Amendments. The complaint named only Warden Robinson as a defendant and made no demand for a jury trial. Shortly after the complaint was filed, Judge Cabranes referred the case to Magistrate Eagan for pretrial proceedings under 28 U.S.C. § 636(b)(1)(A), a reference that was soon broadened. On February 28, 1985, in open court the plaintiff and defendant's counsel executed a standard consent form, agreeing to have the case tried by a magistrate, pursuant to 28 U.S.C. § 636(c), and electing to take any appeal from the magistrate's judgment to the district judge, pursuant to § 636(c)(4). At that time, the Magistrate explained to McCarthy that the trial would be held by the Magistrate at Somers Prison without a jury. McCarthy did not object. Conducting non-jury trials at the prison frequently benefits a prisoner-claimant, since witnesses and documents, needed unexpectedly, are more accessible. On March 5, 1985, Judge Cabranes entered an order

referring the case to Magistrate Eagan "for all further proceedings and the entry of judgment in accordance with Title 28, § 636(c)."

On April 12, 1985, McCarthy filed an amended complaint. This complaint added several defendants but did not alter the substantive allegations. It made no jury demand. On July 2, 1985, he filed a second amended complaint, again adding parties but not altering his substantive allegations. This complaint contained a jury demand. Defendants filed their answer to the second amended complaint on August 26, 1985. No answer had been filed to the prior complaints.

On October 23, 1986, defendants filed papers opposing plaintiff's jury demand, contending, among other things, that McCarthy had agreed to a non-jury trial before the Magistrate on February 28, 1985. On December 22, 1986, Judge Cabranes ruled that plaintiff was not entitled to a jury trial; he relied on the absence of a timely jury demand, *see* Fed.R.Civ.P. 38(b), (d), and noted that the right to a jury trial, once waived, is not revived by an amended complaint that raises no new issues, *see Lanza v. Drexel & Co.*, 479 F.2d 1277, 1310–11 (2d Cir.1973) (in banc). On October 22, 1987, McCarthy moved for a jury trial; the Magistrate recommended denial based on the District Judge's 1986 ruling, and Judge Cabranes adopted this recommendation on January 29, 1988.

On March 24, 1988, plaintiff appeared before the Magistrate for a bench trial at Somers Prison. At the start of the trial, the Magistrate sought a second written consent to proceed under subsection 636(c), even though a first consent had been executed on February 28, 1985. McCarthy refused. Apparently, the Magistrate construed McCarthy's refusal to sign the second consent form as a motion to withdraw the original consent and granted the motion. Magistrate Eagan then conducted an eight-day trial at the conclusion of which he issued a decision entitled "Recommended Findings of Fact and Memorandum of Decision." He recommended detailed findings of fact and ultimate conclusions that excessive force had not been used and that no unlawful action had occurred. When the matter reached the District Court, Judge Cabranes accepted the recommended findings and ordered judgment for the defendants. His endorsement of the Magistrate's proposed findings reflected the Judge's understanding that the matter had been referred under subsection 636(b)(1), *i.e.*, referred for recommended findings. However, in ruling on post-judgment motions, Judge Cabranes amended the citation to subsection 636(b)(1) and stated that after allowing the plaintiff to withdraw his consent, Magistrate Eagan had "essentially act[ed] as a special master pursuant to his powers under 28 U.S.C. § 636(b)(2) and Rule 1(C)(5) of the Local Rules." Judge Cabranes then adopted the Magistrate's recommended findings, acting under Fed.R.Civ.P. 53(e)(2), which requires a district judge to accept a special master's findings of fact unless clearly erroneous. Finally, the District Judge added, "Even upon a *de novo* determination I would reach the same conclusions as the Magistrate." All motions for post-judgment relief were denied.

Discussion

The tangled sequence of events has created some problems, but none that impairs the validity of the judgment rejecting plaintiff's claims on their merits.

1. *The Authority of the Magistrate.* The parties' February 28, 1985, consent to have the matter tried by the Magistrate pursuant to subsection 636(c) was entirely valid. Once given, that consent may be withdrawn on the Court's own motion "for good cause shown" or on request of a party who shows "extraordinary circumstances" warranting such relief. 28 U.S.C. § 636(c)(6); *see Fellman v. Fireman's Fund Insurance Co.*, 735 F.2d 55, 57–58 (2d Cir.1984). No such circumstances existed in this case. The Magistrate therefore could have proceeded under the original 636(c) reference, made findings, and entered judgment. However, he elected not to do so, preferring instead to permit McCarthy to withdraw consent to the 636(c) reference.

[1] Having vacated the 636(c) reference, the Magistrate then used the authority of subsection 636(b)(1)(B) to conduct a hearing and recommend proposed findings of fact concerning "prisoner petitions challenging conditions of confinement." Whether he acted permissibly is our initial inquiry. The matter had originally been referred to the Magistrate for pretrial purposes, under the authority of subsections 636(b)(1)(A) and (B). Arguably, vacating the 636(c) reference left the Magistrate with only the pretrial assignment he had originally been given, but we do not think he was required to take such a narrow view of his authority. With complete propriety, he could have declined to vacate the 636(c) consent and adjudicated the merits definitively. He was surely entitled to take the lesser step of hearing the evidence and submitting recommended findings to the District Judge. The parties' consent is not required for using that procedure, and it is obvious, from the District Judge's subsequent approval of the Magistrate's findings, that the Judge welcomed the Magistrate's help. It would be a needless ritual now to require the District Judge formally to refer the matter under the "prisoner petition" clause of subsection 636(b)(1)(B). The Judge's adoption of the recommended findings demonstrates that the Magistrate was acting entirely in conformity with authority the Judge wished him to exercise.

[2] A more substantial question is whether McCarthy's lawsuit is a petition "challenging the conditions of confinement" within the meaning of subsection 636(b)(1)(B). Subsection 636(b)(1)(B) was added in 1976 as part of a broadening of the authority of magistrates. Act of Oct. 21, 1976, Pub.L. 94-577, 90 Stat. 2729. The House Report does not explain the category "prisoner petitions challenging conditions of confinement" but does refer to "petitions under section 1983 of Title 42." H.R.Rep. No. 1609, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S.Code Cong. & Admin.News 6162, 6171. Most courts have construed the phrase broadly to include almost any complaint made by a prisoner against prison officials, *see Branch v. Martin*, 886 F.2d 1043, 1045 n. 1 (8th Cir.1989) (collecting cases). However, there is a minority view that has focused on the phrase "conditions of confinement" and concluded that it covers only challenges to pervasive prison conditions and excludes claims concerning specific episodes of misconduct by prison officials. *See e.g., Houghton v. Osborne*, 834 F.2d 745 (9th Cir.1987); *Hill v. Jenkins*, 603 F.2d 1256, 1259 (7th Cir.1979) (Swygert, J., concurring).

We see no reason why a Magistrate with clear authority to hold hearings and recommend findings as to the unconstitutionality of continuing prison conditions may not perform a similar function as to specific episodes of unconstitutional conduct by prison officials. The phrase "conditions of confinement" appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all grievances occurring during prison confinement. This meaning emerges from comparing the phrase with the immediately preceding category in subsection 636(b)(1)(B) that covers "applications for posttrial relief made by individuals convicted of criminal offenses." Congress evidently wished magistrates to assist district judges with respect to all prisoner claims and selected phrases to describe the two broad categories of prisoner claims cognizable under 28 U.S.C. §§ 2254, 2255 (challenges to convictions) and 42 U.S.C. § 1983 (challenges to conditions of confinement). *See generally Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973).

The Magistrate was therefore entitled to hold a hearing on McCarthy's complaint and submit recommended findings to the District Judge.

[3] 2. *The Authority of the District Judge.* After initially viewing the Magistrate's proposed findings as submitted under subsection 636(b)(1) and adopting them, Judge Cabranes altered his view in his post-judgment ruling and considered the Magistrate's findings to be "essentially" those of a special master acting under subsection 636(b)(2). Then, explicitly referring to Rule 53(e)(2) of the Federal Rules of

Civil Procedure, governing judicial consideration of a master's findings in a nonjury case, the District Judge accepted the findings as not clearly erroneous, the standard under Rule 53(e)(2). Had the Judge stopped there, his ruling would have been infirm for two reasons.

First, the Magistrate made and forwarded his findings under subsection 636(b)(1), and that subsection requires *de novo* review of any proposed findings to which objection was made. Though we are confident that the Magistrate would exercise the same high degree of care and conscientiousness whether his findings were to be reviewed *de novo* or under a clearly erroneous standard, we would have considerable doubt whether proposed findings made in the expectation of plenary review would be valid, absent reassessment by the recommender, if in fact they received review only under a less rigorous standard. Second, we would also doubt whether this fairly straightforward section 1983 suit would qualify for reference to a special master under the exacting standards of Rule 53(b) (in nonjury matters "a reference shall be made only upon a showing that some exceptional condition requires it" except where a claim requires an accounting or a difficult computation of damages).

[4] Fortunately, the District Judge did not confine his review to the narrow scope appropriate for findings of a special master. Judge Cabranes explicitly determined that upon a *de novo* determination he "would reach the same conclusions as the Magistrate regarding the matters to which there has been objection." This confirmation of the discharge of his responsibilities, as he had originally exercised them under subsection 636(b)(1) when he first adopted the proposed findings, eliminates all question as to the validity of the findings.

[5,6] 3. *Waiver of Jury Trial.* McCarthy contends that he was entitled to a jury trial and never waived this right. The District Judge denied McCarthy a jury on the ground that he had not made a timely demand, pointing out that the initial complaint did not claim a jury and that the second amended complaint, making the demand, added no new substantive allegations. The Civil Rules require a demand for jury trial on an issue no later than ten days "after the service of the last pleading directed to such issue." Fed.R.Civ.P. 38(b). Failure to make a timely demand constitutes a waiver. *Id.* 38(d). However, "the last pleading directed to" an issue is not the pleading that raises the issue, it is the pleading that contests the issue. Normally, that pleading is an answer, or, with respect to a counterclaim, a reply, *id.* Rule 12(a); *see 5 Moore's Federal Practice* ¶ 38.39[2], at 38-367 (2d ed. 1988). In this case, no answer was filed to either the original complaint or the first amended complaint. The answer to the second amended complaint was not filed until August 26, 1985, after plaintiff had made a jury demand. There was thus no waiver by reason of a late demand.

[7] Nor, as the defendants contend, relying on *Lovelace v. Dall*, 820 F.2d 223, 227-29 (7th Cir.1987), was there a waiver because McCarthy did not object to proceeding without a jury at the start of the hearing before the Magistrate. *See also Royal American Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1018-19 (2d Cir.1989). *Lovelace* deemed the plaintiff to have acceded to a bench trial by not objecting at its start, but the case differs significantly from ours because the issue of entitlement to a jury was never litigated. By contrast, McCarthy's jury claim was challenged by the defendants and adjudicated by the District Court. Once that adverse ruling was made, McCarthy was not required to renew his jury demand at the start of the Magistrate's hearing in 1988.

[8] Nevertheless, the defendants are correct in urging that McCarthy waived entitlement to a jury in the proceedings before the Magistrate in 1985 when he consented to proceeding under subsection 636(c). At that time, the Magistrate explained to McCarthy in open court that the proceedings would be conducted at the prison as a bench trial without a jury. With that understanding, McCarthy agreed to the subsection 636(c) procedure. This agreement was consent to a non-jury trial under Rule 39(a). The fact that the Magistrate, three years later, permitted McCarthy to renege on his agreement to have the issues tried by the Magistrate under subsection 636(c) and instead made recommended findings subject to *de novo* review by the District Judge under subsection 636(b)(1) does not undermine the waiver of a jury. McCarthy, though not entitled to any change, succeeded in changing the identity of the judicial officer with final fact-finding responsibility; he did not thereby rescind his consent to have the facts found by a judicial officer.

[9,10] Nor is the waiver invalid because it occurred prior to the defendants' answer. There is no starting time for jury waivers. They may be agreed to even before a lawsuit arises. *See Rodenbur v. Kaufmann*, 320 F.2d 679, 683-84 (D.C.Cir. 1963). Though a litigant might have a basis for obtaining relief from a jury waiver where a subsequent pleading alters the nature of the issue to be decided from what it appeared to be at the time of the waiver, the defendants' answer here had no such effect.

[11] 4. *Free Transcript.* Judge Cabranes denied plaintiff's request for a free transcript of the hearing before the Magistrate, relying on 28 U.S.C. § 753(f) (free transcripts not required where issues frivolous). Though the procedural issues in this case are not frivolous, their resolution does not require examination of the evidence presented at the hearing before the Magistrate, and it was not error to deny McCarthy a free copy of the transcript of that hearing.

5. *Fact-finding.* McCarthy's challenge to the factfinding is without substance. He contends that prison officers planted a knife in his cell as a pretext to remove him. The Magistrate and the District Judge were entitled to reject this claim.

We have considered McCarthy's remaining contentions and find them without merit. The judgment of the District Court is affirmed.

UNITED STATES of America, Appellant,

v.

William RILEY, Defendant-Appellee,

Norman Burnett, Jeffrey Sizemore, Vincent Mazza, Defendants.

No. 575, Docket 89-1387.

United States Court of Appeals, Second Circuit.

Argued Jan. 8, 1990.

Decided June 22, 1990.

The United States appealed from an order of the United States District Court for the District of Vermont, Franklin S. Billings, Jr., Chief Judge, suppressing items seized pursuant to two search warrants. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) search warrant authorizing officers to seize bank records, business records and safety deposit box records at defendant's residence was sufficiently particularized, even though it allowed officers some discretion in executing warrant; (2) officers had probable cause to obtain warrant to search storage locker; and (3) officers acted in good faith in seizing weapons during execution of premises search warrant which explicitly authorized seizure of firearms.

Reversed.

Weinstein, District Judge, sitting by designation, filed a dissenting opinion.

1. Searches and Seizures ⇐125

A search warrant authorizing officers to seize bank records, business records and safety deposit box records from narcotics defendant's residence was sufficiently particularized, even though the warrant permitted officers to examine many papers in the defendant's possession and did not